From:

Sent: Friday, November 14, 2014 2:42 PM

**To:** Larissa DeLango **Subject:** Silo Ridge Project

To: Norman Fontaine and The Town of Amenia Planning Board.

I am submitting these comments, in addition to my earlier ones (sent on 10-20-14 and appended below), in which I questioned whether or not the Planning Board has satisfactorily addressed the issue of completion bond/security for the Silo Ridge project.

In my first email, I addressed the issue on a project-wide basis, with particular attention to a news report stating that Discovery Land (DL) was foreclosed on by its lender, Comercia Bank, in connection with the Spanish Oaks project in Texas in 2010.

In other words, DL reportedly defaulted on a project loan.

I also mentioned, in that email, that, during my years as a surety credit officer, I would not have done business with any developer that had been foreclosed on by a bank.

The proper bonding of a project the magnitude of Silo Ridge is a necessity, whether or not you are dealing with a principal that has failed in a prior obligation or not. Not only do risk management principles require it but basic prudence as well.

To be clear, there are numerous risks inherent in any large project. It is the obligation of both the Planning Board and the Town Board to be aware of them and to assure residents that they have fully scrutinized the developer's application with an eye to mitigating risk.

I draw your attention to the article "Establishing Private Water and Sewer Systems." which appeared in the August/September edition of the Dutchess County Federation newsletter, *Plan On It.* New Tab.

The article states that, if a developer fails either to a) complete the construction of a water and sewer system or b) operate it once it's built, "the responsibility to construct and/or operate passes to the municipality."

The municipality -- <u>at its own expense</u> -- must then hire a contractor to complete the contract and has the <u>option</u> of requiring a bond from that contractor to cover the remaining construction and the maintenance and operation of a water supply system and waste water/sewer system for the first five years.

One bond can be taken to cover everything OR the obligations can be separated, with a performance and payment bond covering the construction; and a maintenance bond, the five-year maintenance/operation period.

There is no reason for a municipality, when faced with such a problem, to not require that the completing contractor be bonded. As the developer has already defaulted, why risk a second default? And potentially burden the taxpayers.

However, while insisting that a completing contractor be bonded should be the minimum requirement on a project that could cost a municipality millions, there is a vastly more protective option.

A completing contractor -- even when bonded -- may not adequately shield a municipality, if the developer, itself, was not bonded. Because, if the developer defaults, there will be costs associated with the uncompleted water and sewer system, regardless of whether or not the project is eventually completed.

And, in the absence of a **bonded developer**, those costs will almost certainly fall to the municipality. That's because a bond from a completing contractor will cover only those costs yet to be incurred and not those that have been incurred already by the defaulted developer.

Therefore, the best way to proceed is for the municipality to take an up-front bond from the developer, whereupon it becomes the responsibility of the developer's surety -- the company that wrote that bond -- to complete the project -- BUT AT NO COST TO THE MUNICIPALITY.

So, how does this apply to Silo Ridge?

In light of the water and sewer issues referenced in the Dutchess County newsletter, I have additional questions for the Planning Board:

- How many bonds, if any, are being required and in what amounts?
- If it's less than 100% bonding, on what basis is the bondable percentage being calculated?
- Is a bond for both land reclamation and water and sewer systems being required, or will they be bonded separately?
- To date, has it been the Planning Board's intention to obtain, from DL, a bond for the water and sewer system component of the project? Because, if not, <u>I</u> <u>could not more strongly recommend it</u>

I specifically recommend that a) the reclamation and b) the water and sewer systems be bonded separately, with the reclamation bond set at a value -- as determined by an engineer's estimate -- equal to the cost of restoring the land. For the water and sewer obligation, I would set the value at 100% of the contract price.

There should be three bonds covering the water & sewer aspect: a) a performance bond to guarantee the timely completion of the project as per the specs; b) a labor &

material payment bond to guarantee the payment of subs and suppliers; and c) a 5-year maintenance bond to guarantee the satisfactory cost of operating the system.

It should be clear to all that the water and sewer aspect adds another key risk element to the project and, by extension, to the Town of Amenia. It is another reason why proper bonding/security is critical and deserves the utmost attention of the Planning Board.

In the interest of transparency and prudence -- given the incalculable cost of a defaulted project -- DL should put up any and all bonds to which the Town of Amenia is entitled under law. There are contingent liabilities here involving serious financial risks, and they should not be borne by the taxpayers.

The Planning Board needs to address this issue and share its findings with the public.

To do otherwise, is to assume needless -- and potentially catastrophic -- risk.

Sincerely,

John A. Duffy 23 Flint Hill Road Amenia, New York 12501

Below is the text of my previous email, sent on 10-20-14.

To: Mr. Norman Fontaine and the Town of Amenia Planning Board My name is John Duffy. I reside, with my wife, Maxine Paetro, at 23 Flint Hill Road in Amenia, as well as in New York.

I spent 30 years in the surety industry as an executive, credit officer and underwriting manager. My experience included performance and payment bonds; forfeiture guarantees; and structured finance guarantees.

After leaving the surety industry, I worked for 6 years as a consultant to a surety in runoff, assisting with the liquidation of their homebuilding and reclamation portfolios.

My concern with this project stems from Discovery Land's (DL) reported involvement in the Spanish Oaks residential/golf course project near Austin Texas.

In an article, dated, September, 7, 2010, statesman.com reported that the project, scheduled for completion in 2012, had been reclaimed, i.e.<u>foreclosed</u> on by its lender, Comercia Bank, late in 2010.

The article also reported that

- DL was the managing partner on this project.
- DL and its partners invested \$20 million in the project in 2005
- DL and its partners attributed the project's failure to the problems that befell the real estate market in 2008.
- The project ran counter to DL's "core principle" of using minimal debt to finance a project. When real estate sales plummeted, the loan could not be repaid.
- DL admitted that the project had been <u>undercapitalized</u>.

I've been advised that the Planning Board cannot require DL to furnish financial information on themselves or any partner or lender. But, given what occurred at Spanish Oaks, general prudence requires that the Planning Board obtain the strongest possible security at Silo Ridge.

And this security should be in the form of a surety bond or a bank letter of credit.

But I can tell you that, as a surety underwriter, I would not have even <u>considered</u> the application for a surety bond from a developer that had been foreclosed on. <u>No consideration whatsoever</u>.

My question is, if the foreclosure and supporting information, as reported by statesman.com is correct, what is the Planning Board's view?

- Is the Planning Board even aware of the Spanish Oaks foreclosure?
- What bonding/security, if any, does Silo Ridge currently carry? What is the amount and what does it cover?
- What level of bonding/security can the Planning Board, by law, require?
- If there currently exists bonding/security, is it in the form of a performance bond; dualobligee (lender included) completion bond; or reclamation bond? Or has a bank letter of credit (L/C) been taken? For instance, were the project to be abandoned, is there a bond or L/C to cover the reclamation of any disturbed land?
- If there is currently no bonding/security requirement, why not?
- And, if not, does the Planning Board know if DL even has a surety or potential L/C provider? When you don't know a company's finances firsthand, anything is possible. And this includes companies with the smoothest pitchmen and glossiest brochures.

My point is that, if the Planning Board, itself, is prevented by law, from financially assessing DL, a surety or L/C provider can and MUST <u>do its due diligence</u> before providing security for a project the scope of Silo Ridge.

No one wishes to see a failed project. For my part, for the project to make sense at all, it must also be in compliance – not only as a finished product, but also in terms of risk mitigation during the construction phase. Because, without the latter, we could wind up with <u>a) an uncompleted project</u> and b) unfunded costs. Not to mention an environmental eyesore/catastrophe.

I urge the Planning Board to view the bonding/security aspect as crucial and, given DL's failure to perform at Spanish Oaks, require – assuming they can provide it – the strongest third-party support the law will allow. If DL cannot provide such security, I would view that as a serious problem.

In addition, it only makes sense that the bonding/security strategy – whether it is based on separate bonds for separate construction phases (usually, the preferred alternative) or a single master bond – should be laid out early enough in the planning phase, so that it can be aired during the public hearing phase and not determined post site-plan approval. Performance security is essential, not an add-on.

Anything short of this approach would <u>not only be imprudent from a risk mitigation standpoint but an abdication of responsibility on the part of the Planning Board</u>. Should the markets again implode as they did in 2008 – and, right now, they are looking volatile – Silo Ridge could face an extremely uncertain future.

And that's one risk you don't want to bear.

Sincerely,

John A. Duffy